

STATE OF MAINE

DEPARTMENT OF MARINE RESOURCES

IN THE MATTER OF THE APPLICATION OF MUSCONGUS BAY AQUACULTURE FOR AN AQUACULTURE LEASE LOCATED IN THE DAMARISCOTTA RIVER, DAMARISCOTTA, LINCOLN COUNTY, MAINE))))))	FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION
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On November 13, 2003 Muscongus Bay Aquaculture of Bremen, Maine applied for an aquaculture lease totaling 7 acres in the coastal waters of the State of Maine, located in the Damariscotta River in Damariscotta, Lincoln County, Maine. The applicant requested the lease for a term of ten (10) years for the purpose of cultivating American oysters (Crassostrea virginica), European oysters (Ostrea edulis), quahogs (Mercenaria mercenaria), bay scallops (Aequipectin irradians), and surf clams (Spisula solidissima) using suspended and bottom culture techniques. The application was accepted as complete on December 12, 2003. A public hearing on this application was held on March 22, 2004 at 6:00 p.m. in Damariscotta.

Approval of aquaculture leases is governed by 12 M.R.S.A. §6072. This statute provides that a lease may be granted by the Commissioner of the Department of Marine Resources (DMR) if it is determined that the project will not unreasonably interfere with the ingress and egress of riparian owners; navigation; fishing or other uses of the area, taking into consideration the number and density of aquaculture leases; significant wildlife habitat and marine habitat or the ability of the site and surrounding marine and upland areas to support ecologically significant flora and fauna; or the use or enjoyment within 1,000 feet of municipally, state or federally owned beaches, parks, or docking facilities. The Commissioner must also determine that the applicant has demonstrated that there is an available source of organisms to be cultured for the lease site and that the lease will not result in an unreasonable impact from noise or lights at the boundaries of the lease site.

Evidence Introduced Concerning the Nature
and Impact of the Proposed Lease

The evidentiary record before the Department regarding this lease application includes the Department file (Exhibit 1), including the application (Exhibit 2) and the Department site report (Exhibit 3), and the record of the March 22, 2004 public hearing. At the public hearing, testimony was given by the applicant, Tonie Simmons, the Department's Aquaculture Environmental Coordinator, Jon Lewis, Damariscotta Harbormaster, Paul Bryant, and one member of the public.

According to the application and the testimony by the applicant, the proposed aquaculture lease is sought to raise American oysters, European oysters, quahogs, bay scallops, and surf clams. The applicant requested a lease site totaling 7 acres and a lease term of ten (10) years. Ms. Simmons, the owner of Muscongus Bay Aquaculture, testified that they operate a shellfish hatchery in Bremen. The applicant testified that they would be growing seed shellfish in floating trays to provide larger seed of alternative species for customers. Additionally, the applicant would be growing American oyster seed to plant on the bottom of the lease site for grow-out to market size. According to the applicant, the floating bags would be located on the northern one-third of the lease site and the remainder of the lease site would be used for bottom planting. The applicant testified that they might also plant oysters under the floating gear. The application indicates a maximum of 3,000 floating bags on 35 long lines that would contain approximately 1-2 million animals. According to the application, there would also be a 22 ft. x 16 ft. work platform located on the lease site. According to the application, activity on the site would occur 1-5 days per week, depending on the time of year. The floating trays would be on the surface from April to November and would be tended to at least once per week. According to the application, American oyster seed would be distributed on the bottom by hand or by SCUBA divers. The oysters on the bottom would be harvested primarily by dragging when conditions allow, usually between April and December. According to the application, a power washer would be used during harvest to clean the product when it is brought to the surface. The applicant testified that

they have become adept at muffling sound in the hatchery and would apply the same technology on the lease site. According to the application, the applicant does not plan to use lighting at the lease site. According to the application, all seed shellfish would be obtained from the applicant's hatchery in Bremen, Maine.

In accordance with Department regulations, Chapter 2.10(3), the applicant provided an environmental characterization of the proposed lease area. According to the application, the river bottom at the proposed lease site consists firm to soft mud. The water depths are estimated to be 2-8 feet at mean low water. According to the application, flora and fauna on the proposed lease site are few and sparsely distributed. The current flow is estimated to be less than .5 m/sec. and flows in a northwest/southeast direction on the ebb tide.

According to the applicant, the proposed lease site is not currently used for moorings and it is not used by riparian owners for access. Thus, according to the applicant, ingress and egress of riparian owners would not be adversely affected. Current uses of the proposed lease site, according to the application, are recreational fishing and kayaking. According to the application, these activities are compatible with the lease activities and would not be excluded. The applicant testified that there is an aquaculture lease located west of the proposed lease site. According to the applicant, the leaseholder stated that there would be no conflicts with his operations.

The Department's Aquaculture Environmental Coordinator (AEC) and his assistant conducted a site visit at the proposed lease area on November 10, 2003. During the site visit, a diver survey, utilizing an underwater video camera, was performed. The AEC created a site report summarizing the information obtained during the site visit and provided testimony regarding the site report at the public hearing.

According to the report and the AEC's testimony, the proposed site is located in the Damariscotta River, offshore of the applicant's property, in water depths ranging from approximately 4.35 feet at mean low water (MLW) to 14.25 feet at mean high water (MHW). The bottom topography of the proposed lease site consists of relatively flat, deep mud, with several

patches of firmer bottom. According to the AEC's report, currents are tidally driven in a northwest/southeast direction. The two major floral and faunal components of the ecology at the proposed lease site are a brown benthic diatom mat and a large population of mud/sand shrimp. Other flora and fauna found at the site include a common occurrence of rock crabs, horseshoe crabs, hermit crabs, and brushy red-weeds and an abundance of American oysters. According to the AEC's report the proposed lease is located in an area classified as conditionally approved for the harvest of shellfish by the Department's Water Quality Division. Additionally, the AEC testified that the proposed lease site is located within an Essential Wildlife Habitat, due to an eagle nest on Hog Island. According to the AEC, the applicant will need approval from the Maine Department of Inland Fisheries and Wildlife prior to conducting any lease activities.

According to the AEC, no moorings or docks were observed within the boundaries of the lease area during the site visit. According to the AEC, the proposed lease activities are not expected to interfere with riparian access. Additionally, according to the AEC, the proposed activities will not interfere with navigation in the area. The proposed lease site is located in shallow water outside the main navigational channel of the Damariscotta River, approximately 231 to 833 feet from the eastern shore of the river, 1,416 feet from the western shore of the river, and 444 feet south of Hog Island. Navigation in the immediate vicinity is likely limited to clam and worm diggers, recreational fishermen and riparian landowners. According to the AEC, there is sufficient water surrounding the proposed lease site for vessel traffic.

According to the AEC's report, no commercial or recreational fishing was observed within the boundaries of the proposed lease site during the site visit. Recreational striped bass fishing is expected to occur to the east and north of the proposed lease site. Additionally, clam and worm digging occurs in the mudflats located to east of the proposed lease site. According to the AEC, the proposed lease activities would not prevent clam and worm diggers from accessing the mudflats. There are thirteen aquaculture lease sites located within one mile of the proposed site. The nearest lease site, DCMF HI2, is located 125 feet west of the proposed lease site. The

AEC testified that he is not concerned with sedimentation from the proposed lease activities impacting other leases in the area.

The Department received oral comments from Keel Kemper, a biologist with the Maine Department of Inland Fisheries and Wildlife. According to Mr. Kemper, the proposed lease site is located within ¼ mile of an eagle nest on Hog Island. However, Mr. Kemper stated that the proposed lease activities are not expected to impact the nest. He noted that the applicant would have to apply for Essential Habitat review if they receive a lease.

Damariscotta Harbormaster, Paul Bryant, provided written comments and oral testimony regarding the proposed lease activities. According to Mr. Bryant, the proposed lease activities are not expected to interfere with navigation or riparian access. Mr. Bryant testified, however, that he is concerned with the ability to site moorings in the lease area in the future.

The adjacent leaseholder, Dick Clime, testified in support of the proposed activities. He stated that he has no objections to the proposed lease site. According to Mr. Clime, his lease activities would not be impacted from sedimentation caused by the proposed activities. Mr. Clime testified that his site is not in the current shadow of the proposed lease site. Additionally, he stated that American oysters are sediment-hardy and that wind-driven chop on spring low tides raises more sediment than any dragging event.

Findings of Fact

The proposed lease is located in the Damariscotta River, outside of the main navigational channel, approximately 231 to 833 feet from the eastern shore of the river, 1,416 feet from the western shore of the river, and 444 feet south of Hog Island. There are no docks or moorings located in proposed lease site. The proposed lease is located in water depths of approximately 4.35 feet at MLW and 14.25 feet at mean high water (MHW). Navigation in the immediate area of the lease consists of vessels associated clam and worm digging, recreational fishing and riparian access. There is sufficient water surrounding the proposed lease site for vessel traffic and access to the mudflats. Based on this evidence, I find that the lease will not unreasonably interfere with navigation or the ingress and egress of riparian owners.

Fishing in the area of the proposed lease site consists of recreational fishing for striped bass to the east and north of the proposed lease site. Additionally, clam and worm digging occurs in the mudflats located to east of the proposed lease site. The proposed lease activities would not prevent clam and worm diggers from accessing the mudflats. The applicant would not exclude fishermen or kayakers from the proposed lease site. There are thirteen aquaculture lease sites located within one mile of the proposed site. The nearest lease site, DCMF HI2, is located 125 feet west of the proposed lease site. The proposed lease activities would not impact the neighboring lease site. The area of the proposed lease is classified as “conditionally approved” for the harvest of shellfish. I find that the proposed lease will not unreasonably interfere with fishing or other uses of the area.

Existing flora and fauna observed at the proposed site consists of a brown benthic diatom mat, mud/sand shrimp, rock crabs, horseshoe crabs, hermit crabs, brushy red-weeds and American oysters. The proposed lease site is located within an Essential Wildlife Habitat, as it is within ¼ mile of an eagle nest on Hog Island. However, the proposed lease activities are not expected to impact the eagle nest. The current is estimated to be less than .5 m/sec. Sedimentation from harvesting activities will not negatively impact the surrounding area. Based on this evidence, I find that the proposed activities will not unreasonably interfere with significant wildlife habitat and marine habitat or with the ability of the site and surrounding marine and upland areas to support ecologically significant flora and fauna.

All seed shellfish will be obtained from the hatcheries of Muscongus Bay Aquaculture in Bremen, Maine. Based on this evidence, I find that there is an available source of American oysters, European oysters, quahogs, bay scallops, and surf clams.

The proposed lease site is not located within 1,000 feet of any municipally, state, or federally owned beaches, parks, or docking facilities. Based on this evidence, I find that the proposed lease site activities will not unreasonably interfere with public use or enjoyment within 1,000 feet of any municipally, state, or federally owned beaches, parks, or docking facilities.

A power washer would be used on the proposed lease site during harvest to clean the product when it is brought to the surface. The power washer would be muffled, using the technology developed at the applicant's hatchery. Additionally, lighting will not be used at the lease site. I find that the proposed lease will not result in an unreasonable impact from noise or lights at the boundaries of the lease site

Conclusions of Law

Based on the above findings, I conclude that:

1. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner;
2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation;
3. The aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in the area;
4. The aquaculture activities proposed for this site will not unreasonably interfere with significant wildlife habitat and marine habitat or with the ability of the site and surrounding marine and upland areas to support ecologically significant flora and fauna;
5. The applicant has demonstrated that there is an available source of American oysters, European oysters, quahogs, bay scallops, and surf clams;
6. The aquaculture activities proposed for this site will not unreasonably interfere with public use or enjoyment within 1,000 feet of municipally, state or federally owned beaches, parks, or docking facilities; and
7. The aquaculture activities proposed for this site will not result in an unreasonable impact from noise or lights at the boundaries of the lease site.

Accordingly, the evidence in the record supports a finding that the proposed aquaculture activities meet the requirements for the granting of an aquaculture lease set forth in 12 M.R.S.A. §6072.

Decision

Based on the foregoing, the Commissioner grants the applicant's requested aquaculture lease of 7 acres from the date of this decision for the purpose of cultivating American oysters (Crassostrea virginica), European oysters (Ostrea edulis), quahogs (Mercenaria mercenaria), bay scallops (Aequipectin irradians), and surf clams (Spisula solidissima) using suspended and bottom culture techniques. The applicant shall pay the State of Maine rent in the amount of \$50.00 per acre per year. The applicant shall post a bond or establish an escrow in the amount of \$5,000 conditioned upon their performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

Conditions to be Imposed on Lease

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities. Conditions are designed to encourage the greatest multiple, compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the aquaculture law.

The following conditions are placed on this lease:

- (1) Navigation and recreational boating and fishing shall be allowed in the open areas of the lease;
- (2) the lease area shall be marked in accordance with U.S. Coast Guard and Department of Marine Resources regulations Chapter 2.80; and
- (3) the lease shall not be issued until written approval is received by the Department from the Maine Department of Inland Fisheries and Wildlife in accordance with the essential habitat review process.

The Commissioner may commence revocation procedures if he determines that substantial aquaculture has not been conducted within the preceding year or that the lease activities are substantially injurious to marine organisms. If any of the conditions or requirements imposed in this decision, in the lease, or in the law are not being observed, the Commissioner may revoke the aquaculture lease.

Dated: _____

George D. Lapointe (Commissioner)
Department of Marine Resources